United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. 77-7116

B

In The

United States Court of Appeals

For the Second Circuit

P/S

DIVISION 580, AMALGAMATED TRANSIT UNION, AFL-CIO,

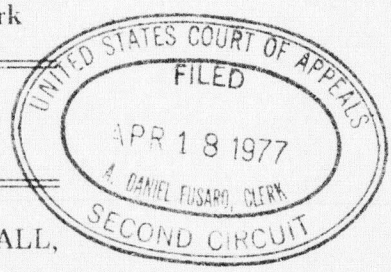
Appellant,

— *vs.* —

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, 508 Midtown Plaza, Syracuse, New York, *et al.*,

Appellees.

On Appeal of An Interlocutory Order Denying Injunction From the Federal District Court, Northern District of New York



APPELLEE'S BRIEF

AXENFELD, WEBB, MARSHALL, BERSANI & SCOLARO
Attorneys for Appellee
Office and Post Office Address
500 South Salina Street
Syracuse, New York 13202
Telephone: (315) 422-9201

Of Counsel:
Barry M. Shulman, Esq.

Daily Record Corporation
Rochester, New York

(8843)

Spaulding Law Printing
Syracuse, New York

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APPELLEE'S BRIEF

STATEMENT OF THE ISSUE

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF-APPELLANT'S APPLICATION FOR A PRELIMINARY INJUNCTION AGAINST A NEW YORK STATE AGENCY OPERATING IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK IN THE FURTHERANCE OF ITS MANDATED CORPORATE PURPOSES.

STATEMENT OF THE CASE

This is an appeal from Hon. Lloyd F. MacMahon, U.S.D.J.'s denial on February 9, 1977 of a preliminary injunction. It is not, as characterized in Appellant's Brief (AB-1)* from the failure of the District Court immediately to order arbitration of the entire dispute.

The Affidavit of Plaintiff-Appellant's President in support of its original Order to Show Cause and Temporary Restraining Order likewise vacated by Judge MacMahon, deals solely with Plaintiff-Appellant's request to stay fact-finding proceedings under the New York State Taylor Law (A-27**).

FACTUAL STATEMENT

The Defendant, CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, (Authority), is a New York State Agency created by Act of the Legislature of the State of New York (A-69-90). It has the power of condemnation. It is

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* Numbers so designated refer to the page cited in the Appellant's Brief.

** Numbers so designated refer to the page cited in the Appendix on Appeal.

a public benefit corporation of the State of New York which has as its statutory mandate the strengthening and improvement of transportation and related services for the residents of the central part of the State of New York. In doing so, it is regarded by the Legislature of the State of New York as performing an essential Governmental function (Section 1329 (2) of the New York State Public Authorities Law (A-74)).

The Authority is empowered to make such internal management decisions as are necessary to govern the exercise of its powers and to fulfil its purposes (Public Authorities Law, Section 1331 (A)(5); A-76). It is empowered to enter into collective bargaining agreements with labor representatives duly elected by the employees of the Authority (Section 1332 (A) (14); A-77).

The Authority is mandated to maintain its operations on a self-sustaining basis, to pay as the same become due the principal and interest on bonds, notes and other obligations of the Authority and of its subsidiary corporations, together with the maintenance of proper reserves (Section 1332 (3); A-78). It is the mandated responsibility of the Authority to take into consideration its sources of revenue, be they fare box or governmental subsidies, and allocate them among the various operating costs and obligations which the Authority or any of its

subsidiary corporations might have to the end that those to whom it renders mass transportation services and those tax payers who support its operations will be best served.

Neither the Authority nor any of its subsidiary corporations have the power to tax.

The Authority is permitted to create subsidiary corporations (Section 1332 (5); A-79).

These subsidiary corporations are likewise Agencies of the State of New York and are public benefit corporations empowered in the same manner as the Authority. At present, there are three (3) such subsidiary corporations: CNY CENTRO, INC., operating in Onondaga County; CENTRO OF CAYUGA, INC., operating in Cayuga County and CENTRO OF OSWEGO, INC., operating in Oswego County.

The Authority receives subsidies from various governmental sources for its operating and capital needs. It receives operating subsidies in accordance with annual appropriations of the New York State Legislature. These legislative appropriations from the State of New York, which the Authority anticipates but over which it has no control, require those counties participating in transportation districts, to match the level of State subsidy. These county and State subsidies are then equally matched by the Federal Government through the Urban

Mass Transportation Administration (UMTA), in accordance with the provisions of the Urban Mass Transportation Administration Act of 1964, as amended.

Capital subsidies vary in amount, depending upon the item purchased and the time when the purchase was made. Most often, at the present time the Federal Government supplies 80% of the funds for approved capital purchases, the State of New York 10% and the Authority, through its own and other local sources, the balance.

Whenever the Authority and authorities or private bus companies throughout the United States receive Federal operating or capital subsidy monies through UMTA as they all do several times a year under varying federal Project designations, the Urban Mass Transportation Act requires, for the receipt of federal funds, the execution of a 13(c) Agreement. This is an agreement drawn under Section 13(c) of the Urban Mass Transportation Administration Act of 1964, as amended (49U.S.C. Section 1609(c)).

Several of these agreements are signed annually. While they may vary slightly in wording, their basic aim is to protect employees who might be adversely affected as a direct result of the carrying out and implementation of the federal Project for which federal operating and capital monies were set aside.

On November 1, 1974, CNY CENTRO, INC., CENTRO OF

CAYUGA, INC. and CENTRO OF OSWEGO, INC. entered into a labor contract with Plaintiff-Appellant. This labor contract, similar to those signed by the subsidiary corporations and their predecessors in interest before them, permits only grievance arbitration; not interest (contract) arbitration.

The most recent labor agreement expired on October 30, 1976. Prior thereto, both the Union and management met on several occasions to negotiate a new agreement. Negotiations having failed, both sides jointly requested the appointment of a mediator by the New York State Public Employment Relations Board (PERB). (A-95).

PERB is a New York State Agency mandated to administer the Taylor Law of the State of New York (Civil Service Law Section 200, et seq).

A PERB mediator was appointed, who met with the parties on three occasions. When an impasse continued, the Authority requested the appointment of a PERB fact-finder, pursuant to the provisions of Section 209 of the Taylor Law (A-91-94). PERB appointed fact-finder Dana Eischen, Esq., (A-96,97). Fact-finding was set to commence on December 20, 1976, the first available date for Mr. Eischen.

All prior negotiations between the Authority's subsidiary corporations and Plaintiff-Appellant had been con-

ducted under the Taylor Law, in a manner similar to the contract negotiations of all other transportation authorities throughout the State of New York.

Just prior to December 20, 1976, the Authority was notified for the first time that Plaintiff-Appellant refused to meet with the fact-finder, claimaing rights under a certain 13(c) Agreement annexed to Plaintiff-Appellant's papers originally before Judge MacMahon (A-46-57).

At this point, the Authority, being responsible for the maintenance of its operations, became increasingly concerned in regard to the necessity that negotiations continue under the Taylor Law due to incidents such as are set forth in the Affidavit of Warren Woodruff at A-101-105.

The 13(c) Agreement under which the Union claims a right to submit an impasse in labor negotiations to an impartial panel of arbitration was one signed by all parties in March of 1975 for the purpose of enabling the Authority, through the receipt of federal funds, to purchase the Syracuse & Eastern Transit Corporation, (S&E), an extremely small local company operating primarily in two suburban towns in Eastern Onondaga County. It was later amended to permit federal funds to flow

for the capital purchase of certain replacement and other buses, bus shelters, radios and fare boxes as well as a garage facility to be built in Cayuga County. (A-46). In its Brief, Plaintiff-Appellant deliberately misleads this Court at AB-31, when it states that S&E is the past employer of the Union's members. This implies that it was through the purchase of S&E that Plaintiff-Appellant's members or the majority of them became employed by the Authority's subsidiary corporations.

In actual fact, a plenary trial would indicate that of the approximate 230 drivers for the Authority's subsidiary corporations, only two (2) originally came from the purchase of S&E, both non-union, of whom only one (1) remains in Defendants-Appellee's employ; and of the 40 mechanics employed by Defendants-Appellees, only one (1) who was non-union, came from S&E. S&E when acquired owned less than five (5) buses and employed approximately five (5) non-union drivers and mechanics. This was hardly a purchase that would induce the Authority forever to bargain away its rights regarding the resolution of impasses in contract negotiations through an improper delegation of authority to a third party arbitrator.

When the Authority received notice of the Union's position that the 13(c) Agreement which enabled UMTA to supply revenues to the Authority to subsidize such purchase, mandated interest arbitration, the Authority immediately

notified the Union of the Authority's position--that the 13(c) Agreement does not mandate the arbitration of contract negotiations; that the only arbitration compelled in the 13(c) Agreement is for the protection of employees who are directly adversely affected as the result of a federal Project; that the 13(c) Agreement advanced by the Union specifically discusses the adjustment of grievances, claims, differences or controversies:

> "....arising out of or by virtue of the provisions of (this 13(c)) Agreement for the protection of employees affected by the project;" (parenthesis added)

that the 13(c) Agreement advanced by the Union had expired with the closing of the grant and project for which it was given; that it had been superseded by another "National" 13(c) Agreement between the parties. (See A-106-109); and that no 13(c) Agreement gives Union employees any greater rights than they enjoyed while employed by the private predecessor corporation.

Nothing more was heard from the Union after the statement of its initial position not to attend fact-finding (A-63). The Authority therefore again requested the appointment by PERB of a fact-finder. This was accomplished and fact-finding was rescheduled to take place on January 24, 1977, the next available date for the PERB

fact-finder. The Authority, for the second time, prepared for fact-finding.

January 24, 1977 was a Monday. On the Friday before, January 21, 1977, the PERB fact-finder received a telephone call from the attorney for the Union, requesting an adjournment due to a conflict in scheduling. The Union, after it first opposed fact-finding to proceed on December 20, 1977, and throughout this period of time, made no further steps against fact-finding but rather cooperated in its scheduling.

The letter from the PERB fact-finder confirming an adjournment for the convenience of the attorneys for the Union, is set forth at A-100:

> "Gentlemen: Confirming our recent telephone conversations, the fact-finding hearing set for January 24, 1977 has been adjourned at the request of Mr. King who has an unanticipated scheduling conflict. This matter shall now go forward at 10:00 am, Wednesday, February 9, 1977."

Fact-finding was thereupon re-scheduled for February 9, 1977, the next available date for the PERB fact-finder, the Authority receiving no indication except that all parties would attend.

Under the Taylor Law, fact-finding is an advisory procedure in which the parties meet on their own in communication with a fact-finder, or before the fact-finder, in an effort to resolve contract differences. (See New

York State Civil Service Law (Taylor Law) Section 209 (2)).

On the eve of fact-finding, at approximately 4:00 in the afternoon, the Authority, its subsidiary corporations, Members of their Boards and applicable officers and employees, were served with an Order to Show Cause which was obtained ex parte and in which was contained a Temporary Restraining Order staying fact-finding until a hearing could take place on February 15, 1977.

Knowing the grave difficulties that an increasingly disturbed labor force could cause (See Warren Woodruff Affidavit, A-101-105), the Authority, through its counsel, telephoned Judge MacMahon to see if the hearing on the granting of a preliminary injunction could not be advanced. Judge MacMahon was kind enough to set the following morning for a hearing. All parties filed their papers with Judge MacMahon prior to the hearing held on February 9, 1977, the date on which the adjourned fact-finding was to have been held. The transcript of that hearing is set forth at A-132-181 and the Endorsement which issued therefrom, at A-5.

Judge MacMahon decided:

> "Based on the agruments, the papers submitted in support of and in opposition to this motion, and on the court's reasons, findings

> and conclusions placed on the record the within motion for a preliminary injunction is denied in all respects since plaintiff has failed to make a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward plaintiff. See Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F. 2d 247 (2d Cir. 1973.)."

The parties were then directed to proceed forthwith with the fact-finding procedures under the Taylor Law.

While it is true that in his Decision rendered from the bench Judge MacMahon concluded for the purpose of determining the application for a preliminary injunction, that the 13(c) Agreement was a valid and binding agreement, but that the parties had intentionally and voluntarily elected their remedies under the Taylor Law, he later in two separate Decisions (See A-133-180, 299-303) further explained and supported the position in his Endorsement (A-5) and determined that the issues concluded by him on February 9, 1977 were preliminary conclusions only in regard to the application for a preliminary injunction. Judge MacMahon stated to Union counsel:

> "You file a complaint that raises a myriad of problems. The move for a preliminary injunction which I denied simply on the ground that you can't show a clear legal

> right to relief for such serious crises going to the merit (sic) that everything should be held in abeyance. The reasons for that are perfectly clear. These are problems of first impression. There is no authority for any of these propositions that you tendered here. Rule on the preliminary matter as I did here is not to say that you are entitled to a summary judgment. That is a long ways from where you stand now, or not to say that the other side is entitled to a summary judgment. All I held is that you were not entitled to a preliminary injunction, and I adhere to that. You are not entitled to preliminary injunction for the reasons which I stated on the record, and in my memorandum of February 9th. But you have got a can of worms here with all kinds of issues of fact going to the intent of the parties, until the full meaning of all these agreements that are involved here, to whether the underlying collective bargaining agreement has expired, whether it is superseded by this tri-party agreement with Centro, whether there has been a waiver, which I found there has been preliminarily, sufficient to refute you for preliminary injunction. But that is not to say that on a plenary trial you couldn't prove that you had not waived. Those issues of fact are open. They are all open and it can't be decided by affidavit or argument. It seems to me it requires a plenary trial." (A-228-230)

Further, Judge MacMahon stated,

> "These were all issues for purposes of a preliminary injunction in the urgent, what was represented to be an urgent situation, which now doesn't seem so urgent. Since everything can be put off until March, I don't see a great urgency. But what was represented to the Court to be an urgent situation that this thing had to go forward tomorrow, and on the basis of that, I ran over here from Utica and held a hearing to determine whether this temporary restraining

> order should remain in full force and affect or whether it shouldn't. And since that involves substantially the same issue as the motion for a preliminary injunction, I treated it as the argument on a motion for a perliminary injunction and denied it and vacated the T.R.O." (See A-232-233)

and again at A-234

> "But when I say all parties can see that there were no issues of fact requiring an evidentiary hearing and that the motion was right for decision, is not to say there aren't any issues of fact requiring a plenary trial. There are all kinds of them, it seems to me."

In his Memorandum Opinion dated March 7, 1977 (A-299-303),

Judge MacMahon stated:

> "This action is rooted in a labor dispute between plaintiff transit union and defendant, Central New York Regional Transportation Authority, an agency of the State of New York. It appeared upon the hearing that plaintiff's collective bargaining agreement with defendant expired on November 1, 1976 and that, while the parties were attempting to negotiate a new agreement, disputes arose and plaintiff invoked the impasse resolution procedures of the Taylor Law. Civil Service Law Section 209(a) through (d). The first step of those procedures, mediation, failed to resolve the dispute. Accordingly, the New York Public Employment Relations Board proceeded to the second step and appointed a fact-finding board which scheduled a hearing.
>
> After some adjournments, a hearing was finally set for February 9, 1977. Two days before the scheduled hearing, plaintiff applied in the District Court, sitting in Syracuse, for a temporary restraining order bringing on a motion for a preliminary injunction. Sunce Judge Munson was disqualified, the matter was referred to the undersigned, who was then sitting in Utica by

designation. Since we were in the midst of a trial, after the papers were read to us, we granted a temporary restraining order to preserve the status quo until we could reach the matter for a hearing.

On application of defense counsel to vacate the temporary restraining order, we accelerated the hearing of the motion for a perliminary injunction, with plaintiff's consent, in Syracuse on February 9, 1977. The essential question on the hearing was whether plaintiff had the right to complusory arbitration under what was referred to as "the 13(c) agreement...." or whether plaintiff was subject to the New York Taylor Law, Civil Service Law Section 209, and its impasse resolution procedures.

Following the hearing, we denied plaintiff's application for a preliminary injunction and vacated the temporary restraining order for reasons which we dictated into the record. The transcript of the hearing is badly garbled, but essentially we held that plaintiff either waived its right to arbitration or voluntarily elected to proceed under the Taylor Law and could not, on the eve of the fact-finding hearings, change its course to the detriment of the transportation authority. It also appeared that plaintiff had failed to make a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair game for litigation and a balance of hardships tipping decidedly toward plaintiff.

The case posed novel questions of law, entangled with lurking questions of fact, all of which necessarily precluded a clear showing of probable success. Moreover, we could see no irreparable injury in plaintiff's proceeding to fact-finding, since all that the fact-finding board can do is render an advisory opinion. Against this, there was a decided public interest in the expeditious settlement through the Taylor Law of this labor dispute in the bus transportation industry of Central New York to the end that the riding public will not be confronted with inconvenience. In our view, that tipped the balance of hardship in

favor of the defendant authority.

> It now appears that, following our decision, fact-finding was first scheduled for February 16, 1977 but adjourned to March 9, 1977, to accommodate plaintiff's attorneys. As before, the within application for a stay comes on the eve of those hearings and strikes us as just a maneuver to gain some tactical advantage in this labor dispute. Moreover, a stay would in fact grant the injunction which, in our considered judgment, should be denied for the same reasons which prompted us to deny the application for a preliminary injunction and vacate the temporary restraining order. See 7 J. Moore, Federal Practice Section 62.05 at 62-18 et seq (2d ed. 1975)."

After Judge MacMahon's original Decision on February 9, 1977, both parties arranged for fact-finding to proceed on February 16, 1977. Because of a conflict in the schedule of Plaintiff-Appellant's attorney and the fact-finder, this was postponed until March 9, 1977. In the meantime, motions to dismiss and summary judgment motions were made by both parties before Judge MacMahon (A-183-214), Judge MacMahon denying both motions on February 21, 1977 (A-183-235).

The Authority prepared for fact-finding to proceed on March 9, 1977 as it had several times previously, but on March 7, 1977, the Union again moved before Judge MacMahon for a stay of fact-finding pending this appeal. (See A-237-261). This was opposed by Defendants-Appellees (A-262-296) and Judge MacMahon in the aforecited Memorandum Decision (A-299-303) again denied the stay, clarifying the reasons which justified his denial of the preliminary injunction

originally sought by Plaintiff-Appellant.

Plaintiff-Appellant then appealed Judge MacMahon's denial of the stay pending appeal before this Court, such appeal being heard by a three judge panel of this Court on March 15, 1977. This Court affirmed Judge MacMahon's Decision from the bench. This Court likewise and at the same time gave Defendants-Appellees leave to move to dismiss the Appeal, at the time of the Appeal itself.

It is the contention of Defendants-Appellees that Judge MacMahon's discretion was not abused and that the position of the Union that the 13(c) Agreement clearly permits their right to submit any and all grievances or disputes of whatever nature to arbitration is patently improper and obviously never the intention of any of the parties. If the parties had so intended such wide spread implications in the boiler plate of an agreement executed in 1975 for the purpose of purchasing, with federal funds, a bus company with five buses and three employees coming with the public company, there would have been no need for the Union to sign the subsequent national 13(c) Agreement or any other subsequent 13(c) Agreement. Similarly, the same national union has signed similar 13(c) Agreements throughout New York State and even the United States several times annually for the receipt of federal funds for capital or operating projects. It has never before asserted such a right. This leads one to ask the question,

"Why then did Plaintiff and its national union in each and every subsequent year, sign several 13(c) Agreements for the receipt of federal funds for designated projects in addition to the national agreement?"

It is the contention of Defendants-Appellees that for the reasons hereinbefore and hereinafter set forth, Plaintiff-Appellant has no clear right to arbitrate. This was likewise the position of Judge MacMahon and of this Court in several motions previously brought.

STATEMENT OF ARGUMENTS

1. JUDGE MACMAHON DID NOT ABUSE HIS DISCRETION IN DENYING THE PRELIMINARY INJUNCTION TO APPELLANT BELOW.

   A) DEFENDANTS-APPELLEES ARE AGENCIES OF THE STATE OF NEW YORK, THEIR OFFICERS, DIRECTORS AND CERTAIN EMPLOYEES, ALL OF WHICH ARE ACTING UNDER CLEAR AUTHORITY DELEGATED AND MANDATED UNDER THE LAWS OF THE STATE OF NEW YORK.

   B) THE 13(c) AGREEMENT IS A FUNDING MECHANISM TO INSURE THAT THE RECEIPT OF FEDERAL FUNDS FOR A PROJECT DOES NOT ADVERSELY AFFECT PRESENT EMPLOYEES.

   C) PLAINTIFF-APPELLANT, WHEN IT REPRESENTED MEMBERS OF THE PRIVATE CORPORATIONS WHICH WERE PREDECESSORS TO DEFENDANT-AUTHORITY DID NOT HAVE THE RIGHT TO ARBITRATE AN IMPASSE IN CONTRACT NEGOTIATIONS.

D) THE TAYLOR LAW OF THE STATE OF NEW YORK CLEARLY EVIDENCES THE POLICY THAT NEW YORK STATE AGENCIES DETERMINE THE RESOLUTION OF IMPASSES IN COLLECTIVE BARGAINING IN ACCORDANCE WITH THE PROCEDURE SET FORTH THEREIN, UNLESS SUCH STATE AGENCIES KNOWINGLY AND INTENTIONALLY CONTRACT AWAY SUCH PROCEDURES.

E) JUDGE MACMAHON DID NOT ABUSE HIS DISCRETION IN FINDING THAT THE APPELLANT BY ITS INTENTIONAL AND VOLUNTARY CONDUCT WAIVED ANY RIGHT IT MIGHT HAVE HAD TO PROCFED OUTSIDE OF THE TAYLOR LAW.

2. TAYLOR LAW PROCEDURES WILL NOT IRREPARABLY HARM PLAINTIFF-APPELLANT.

3. DEFENDANTS-APPELLEES WILL BE IRREPARABLY HARMED IF THIS COURT STRETCHES THE INTERPRETATION OF THE MEANING OF A 13(c) AGREEMENT TO SUCH AN EXTENT THAT DEFENDANT-APPELLEES AND EVERY OTHER TRANSPORTATION AUTHORITY AND PRIVATE BUS COMPANY IN THE UNITED STATES WHICH RECEIVE FUNDS FROM UMTA, ARE FOREVER STRIPPED OF THEIR POWER TO NEGOTIATE AND CONTROL IMPASSES IN NEGOTIATIONS, PURSUANT TO APPLICABLE STATE LAW, AND MUST PERPETUALLY REFER CONTRACT NEGOTIATIONS TO A THIRD PARTY ARBITRATOR WHO IS NOT RESPONSIBLE UNDER STATE STATUTE FOR THE MAINTENANCE OF THE AGENCY'S OPERATIONS ON A SELF-SUSTAINING BASIS

4. THIS APPEAL IS MOOT.

1. JUDGE MACMAHON DID NOT ABUSE HIS DISCRETION IN DENYING THE PRELIMINARY INJUNCTION TO APPELLANT BELOW.

The reason given by Judge MacMahon in his initial Endorsement (A-5), as the basis for denying the preliminary injunction sought by Plaintiff-Appellant is correct under Federal law. Judge MacMahon stated:

> "Based on the arguments the papers submitted in support of and in opposition to the motion, and on the Court's reasons, findings and conclusions placed on the record, the within motion for a preliminary injunction is denied in all respect since Plaintiff has failed to make a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tipping decidedly toward Plaintiff. See Sonesta Int'l Hotel Corp. v. Wellington Associates, 483 F. 2d 247 (2d Cir. 1973)."

The Sonesta case was recently reaffirmed by this Court in the case of Canadian Transport Company v. Irving Trust Company, Case No. 441 decided January 17, 1977, Docket No. 76-7401.

The universally accepted standard for the appellate test of a preliminary injunction is whether there was an abuse of discretion in granting or denying it. Morgan v. Fletcher, 518 F. 2d 236, 239 (5th Cir. 1975); Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc., 545 F. 2d 1096 (7th Cir. 1976), where the Court discusses the basis for a denial of a preliminary injunction upon the ground that it will not disserve the public interest, see also Burns v.

Paddock, 503 F. 2d 18, 28 (7th Cir. 1974); Milsen Co. v. Southland Corp., 454 F. 2d 363, 367 (7th Cir. 1971).

It is clear that the grant of a preliminary injunction is the exercise of an extremely far-reaching power not to be indulged in except in a case clearly warranting it, Sierra Club v. Hickel, 433 F. 2d 24, 33 (9th Cir. 1970); and that a preliminary injunction is an extraordinary remedy which is not available unless Plaintiffs carry their burden of persuasion as to all the prerequisites. Canal Authority v. Calloway, 489 F. 2d 567 (5th Cir. 1974).

In Diversified Mortgage Investors v. Life Title Insurance Company of New York, 544 F. 2d 571 (2d Cir. 1976), this Court held:

> "The purpose of a preliminary injunction is to maintain the status quo pending a final determination on the merits.....It provides relief which is "interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness".....It should not be used as a device for creating a new contract between the parties or deciding questions of contract breach, properly determinable after trial....It is not an adjudication on the merits.....and it should not grant relief properly awarded only in a final judgment.....
>
> "Furthermore, it is well settled that a preliminary injunction is an extraordinary remedy that should not be granted except upon a clear showing that there is a likelihood of success and irreparable injury..... or that there is an important and difficult issue to be determined justifying more deliberate investigation and that the "balance of hardships tips decidedly toward the party requesting the temporary relief".....

The United States Supreme Court held in Lemon v. Kurtzman, 411 U.S. 192, 36 L.Ed. 2d 151, 93 S. Ct. 1463 (1973),

at 36 L.Ed. 2d 166, when discussing the extent to which state officers should be bound by Federal Courts:

> "We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on one of the first principals of Constitutional adjudication - the basic presumption of the Constitutional validity of a duly enacted State or Federal Law... Federalism suggests a Federal Court intervention in State Judicial processes be appropriately confined....likewise Federalism requires that Federal injunctions unrelated to State Courts be shaped with concern and care for the responsibilities of the Executive and Legislative branches of State Governments....absent contrary direction, State officials and those with whom they deal are entitled to rely on a presumptively valid State statute enacted in good faith by no means unlawful."

See also Brown v. Chote, 411 U.S. 452, 36 L.Ed. 2d 420, 93 S.Ct. 1732 at 36 L.Ed. 2d 424 (1973); and 7 Moore Fed. Practice p. 65.18 (1) p. 65-129:

> "Congress has broad power to restrict or regulate the federal injunctive power and it has exercised this power on many occasions. And the courts have further restricted the use of the federal injunction where it would improperly interfere with certain state policies and where decision of local questions would be better had in the state or territorial courts."

This Court on March 15, 1977 affirmed Judge MacMahon's denial of a stay pending appeal. Judge MacMahon, himself, equated his denial of a stay to his original decision denying the preliminary injunction. Judge MacMahon stated:

> "Moreover, a stay would in fact grant the injunction which, in our considered judgment, should be denied for the same reasons which prompted us to deny the application for a preliminary injunction and vacate the temporary restraining order. See 7 J. Moore, Federal Practice, Paragraph 62.05 at 62-18 et seq. (2d Ed. 1975)." (A-303)

This Court's affirmance of that denial forms the firm basis

for the denial of the Appeal itself, since the Appeal is from the denial of the preliminary injunction to which Judge MacMahon equates his denial of the stay. This Court has already on March 15, 1977, reached the conclusion which it must reach now, that Judge MacMahon's discretion was not abused.

Defendants raised several affirmative defenses in their answer below (A-273-281). These affirmative defenses outline the reasons to support Judge MacMahon's denial of the stay on March 9, 1977 and include the fact that the Authority and its subsidiary corporations are agencies of the State of New York and public benefit corporations, that this Court lacks jurisdiction over the subject matter; that this is merely an agreement signed and a local Union certified in accordance with the provisions of the New York State Taylor Law; that the Taylor Law provides applicable and governing impasse procedures; that the 13(c) Agreement was never meant to bind the parties to arbitration and that there are factual issues regarding which 13(c) Agreement controls; that both parties have participated voluntatily within the Taylor Law in this negotiation and several prior negotiations and that Plaintiff has placed itself voluntarily and intentionally within the Taylor Law; and that there is no agreement between the parties mandating interest arbitration.

In addition, as has been shown on several occasions by Affidavit before this Court, the Union has felt no urgency to this matter, all delays in fact-finding as evidenced by the record before this Court have been delays of Union counsel or the Union Executive Board. The Authority has pressed continually for swift resolution of the contract disputes under the Taylor Law.

A) DEFENDANTS-APPELLEES ARE AGENCIES OF THE STATE OF NEW YORK, THEIR OFFICERS, DIRECTORS AND CERTAIN EMPLOYEES, ALL OF WHICH ARE ACTING UNDER CLEAR AUTHORITY DELEGATED AND MANDATED UNDER THE LAWS OF THE STATE OF NEW YORK.

Judge MacMahon, in his several decisions, set forth in the Appendix, clearly indicates the reasons supporting his determination that the preliminary injunction originally sought by Plaintiff-Appellant be denied. It is respectfully contended that there is ample, if not overwhelming support for Judge MacMahon's determination.

In reaching his decision, Judge MacMahon stated (A-5) that the:

> "Plaintiff has failed to make a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward plaintiff. See Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F. 2d 247 (2d Cir.)."

At A-228 et seq., Judge MacMahon states that the Complaint raises a myriad of problems, that Plaintiff failed to show a clear right to relief or sufficient seriousness of a crises going to the merits, that the problems presented were of first impression, that there

are many issues of fact,

> "...going to the intent of the parties until the full meaning of all these agreements that are involved here, to whether the underlying collective bargaining agreement has expired, whether it is superseded by this tri-party agreement with Centro, whether there has been a waiver, which I found there has been preliminarily, sufficient to refute you for preliminary injunction.
> ...those issues of fact are open. They are all open and it cannot be decided by affidavit or by argument. It seems to me it requires a plenary trial".

Further questions that Judge MacMahon raised (A-230) include whether

> "...you have got a valid agreement to arbitrate, which in turn depends on resolution of all these various issues of fact. On whether there is such an agreement, I suppose is a question of fact turning essentially on what the parties intended here, beyond all of this paper work that we have here. I don't think this case anywhere near right for an ultimate determination at all. I think there are just too many uncertain questions of Law, too many issues of fact which are all up in the air".

Judge MacMahon stated at A-232 that he does not see any urgency from the conduct of the Union Plaintiff-Appellant in not moving forward expeditiously under his Order.

At A-303, Judge MacMahon stated his displeasure with the Union utilizing the Court merely "... as just

a manuever to gain some tactical advantage in this labor dispute".

The Authority is a New York State Agency created and empowered by the Public Authorities Law of the State of New York (A-69-90). It was created by the Legislature of the State of New York to develop and improve transportation and other services within its transportation district by railroad, omnibus, marine and air. Its purposes are regarded as "essential Governmental functions". (See Public Authorities Law Section 1329; A-74).

The members of the Authority lack the power to tax. They are, however, mandated by law to operate the Authority and its subsidiary corporations on a self-sustaining basis (Public Authorities Law Section 1332 (A)(3); A-78). This self-sustaining basis assumes the receipt of Federal, State and local subsidy funds in addition to fare box, charter, advertising and other similar revenues.

A plenary trial below will demonstrate that at the time the Authority and other similar transportation authorities throughout the United States were created, the private predecessor company was bordering on going out

of business. Without a State authority, its operations would probably not have lasted more than one year and all of its employees would most likely have been forced to find other employment. Additionally, the level of service to those living and shopping in and around the central business districts and their suburbs, was diminishing at a geometric rate, carrying a direct negative effect on the economic stability of Central New York and its municipalities, as well as on a declining job force.

What might have happened had authorities such as the Central New York Regional Transportation Authority not been created, is speculative. What is not speculative is that the authority was created, that those employees of the private predecessor corporation were employed, that levels of service increased throughout the Central New York Regional Transportation District, and that the receipt of Federal, State, County and other local funding has dramatically improved the working conditions and security of Plaintiff-Appellant's members.

At a plenary trial, proof will further be offered to the effect that contrary to the allegations raised in Plaintiff-Appellant's Brief, no clause existed between Plaintiff and the private predecessor to Defendant-Authority,

providing for arbitration of the resolution of impasses in contract negotiations.

All prior negotiations between the Authority and Plaintiff-Appellant have been resolved under the Taylor Law. A plenary trial will indicate that all contract negotiations between all transportation authorities in the State of New York, all of their subsidiary corporations and the Unions with which they deal have likewise been resolved within the impasse procedures of the Taylor Law, including legislative mandates, even though the 13(c) Agreement signed by such authorities and their Unions are substantially similar, if not identical to those signed from time to time by the parties to this litigation.

Further, Amendment XI to the United States Constitution, as interpreted by the United States Supreme Court, prevents citizens of a State from suing that State in Federal Court absent a State's waiver of immunity. See Ex parte Young, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908), and Edelman v. Jordan, 415 U.S. 651, 39 L.Ed. 2d 662, 94 S.Ct. 1347 (1974), where the Court at 39 L.Ed. 2d states:

"While the Amendment by its terms does not

> bar suits against a State by its own citizens, this Court has consistantly held that an un-consenting State is immune from suits brought in Federal Courts by her own citizens, as well as by citizens of another State."

It is equally clear that this protection extends to State Agencies and that in this case no such consent or waiver of immunity has been given by the State of New York or Defendants-Appellees.

B) THE 13(c) AGREEMENT IS A FUNDING MECHANISM TO INSURE THAT THE RECEIPT OF FEDERAL FUNDS FOR A PROJECT DOES NOT ADVERSELY AFFECT PRESENT EMPLOYEES.

The 13(c) Agreement advanced by the Union (A46-57), or similar agreements executed throughout the United States by public and private companies alike, is a requirement of the Urban Mass Transportation Administration Act for the receipt of a Federal grant of operating or capital subsidy assistance for a specifically designated Project (Section 13(c) of the Urban Mass Transportation Administration Act, as amended, 49 U.S.C. 1609(c)). Originally, the Project for which that specific 13(c) Agreement was executed, contemplated only the purchase of S&E, which Plaintiff-Appellant in its Brief improperly mis-casts as the successor in interest to CNY CENTRO, INC., the largest of the Authority's subsidiary corporations.

In actual fact, the purchase of S&E brought to the Authority only three (3) buses, two (2) previously non-Union drivers, of which one (1) is now employed, and one (1) previously non-Union mechanic.

It was an extremely small operation which was bought to expand the Authority's operations in the eastern suburbs of Onondaga County, in accordance with direction given to the Authority by its local Metropolitan Planning Organization. It would be ridiculous to assume that the Authority, in signing a 13(c) Agreement for such a purchase, which was insignificant in terms of its total operation, would deviate from its statutory mandate as delegated to its Board to operate the Authority on a self-sustaining basis, and to forever-after delegate contract negotiating to a third party arbitrator who is not bound by such a mandate.

In a landmark PERB decision, City of Mount Vernon and Local 456 International Brotherhood of Teamsters Chauffers, Warehousemen and Helpers of America, Case No. U-0424 (PERB Board Decisions, paragraph 5-3057), the PERB Board held:

> "The core of the Taylor Law is the policy that governments should negotiate and enter into written agreements with employee

> organizations representing public employees which have been certified and recognized. Coercive action by an employee organization to impose its will is inappropriate. So is coercive action by a public employer. Nevertheless, there are occasions when contesting parties cannot reach an agreement and yet the business of government must proceed. The exigencies of government are particularly related to its budget-making process, and if the parties fail to reach an agreement, the budget of an employer must be confronted without an agreement having been made. To cover this eventuality, the law provides that the legislative body of the government involved shall take such action as it deems to be of public interest, including the interest of the public employees involved.
>
> In some measure, the function of a local legislature is similar to that of an arbitrator. There being an unresolved dispute between an employee organization and the executive branch of the government, the legislative body is to resolve the dispute by taking action that considers the interests of both parties. This responsibility was given to the local legislature, both because (unlike an ad hoc arbitrator) it has a continuing public responsibility and because it is a representative agency responsible to all interest groups, including public employees".

The Project originally granted by the Federal Government for the purchase of S&E was later amended to include the purchase of several replacement and additional buses, bus shelters, radios and the construction of a garage and maintenance facility in Cayuga County. These are listed on the 13(c) Agreement itself at A-46.

The 13(c) Agreement advanced by the Union, by its own terms, restricts the requirement of arbitrating a labor dispute to,"... the protection of employees affected by the Project".

Had a labor dispute arisen or a contract negotiation been required between the Authority and those employees of S&E at the time of their assumption into the employ of the Authority's subsidiary corporations, this would probably have been a proper subject for arbitration under the 13(c) Agreement. Similarly, if the construction of the Cayuga maintenance facility with Federal funds resulted in the reduction of force at the Onondaga County garage facility, such reduction being as a direct result of the federal Project, this too would probably have been the proper subject of protection under the 13(c) Agreement. Likewise, if the purchase of new buses had resulted in the reduction of maintenance force, a failure to reach agreement on the reduction of force might be properly submitted to arbitration pursuant to the provisions of the 13(c) Agreement and in accordance with 49 U.S.C. 1609(c).

It is ridiculous, however, for the Union to contend that the signing of an agreement in 1974 which enabled the Authority to receive federal funds for the purchase

of an extremely small local bus company and some other capital equipment, would forever bind the Authority to submit any dispute, regardless of its nature, to a third party disinterested arbitrator. Such intent is not evidenced by the parties themselves. There have been impasses in previous negotiations between the parties to this litigation, and although 13(c) Agreements were then in effect, the parties resolved their impasses under the Taylor Law. Further, if the 13(c) Agreement, as the Union contends, forever binds the Authority to arbitrate any labor dispute, then why did the Union and the Authority annually execute many 13(c) Agreements? Any why is it that this same National Union signed the National 13(c) Agreement and annually signs thousands of 13(c) Agreements? The reason is clear. 13(c) Agreements are signed for the protection of employees who may lose previously held rights by virtue of the implementation of a federally subsidized Project, and those rights if not resolved between the parties, may be submitted to arbitration. No 13(c) Agreement was ever intended by any signatory thereto to forever divest a public employer such as the Authority, from its statutorily mandated obligation to protect those governmental interests delegated to it.

A plenary trial will indicate, however, that at no time was any work force diminished or any employee displaced by virtue of the receipt of Federal funds. To the contrary, all Federal funds received enhanced working conditions, permitted the hiring of new personnel and made secure the previously tentative employment positions held by Plaintiff-Appellant's members under the private companies, predecessor to the Authority.

The original 13(c) Agreement advanced by Plaintiff-Appellant was executed on March 11, 1976. On July 23, 1975 the American Public Transit Association (APTA) and the National Amalgamated Transit Union, together with the Transit Workers Union of America, executed a National 13(c) Agreement, referred to by Judge MacMahon as the "tri-party agreement", which was to be used by all transportation authorities and local unions who so desire, not only for the receipt of operating funds, but as a guide for the receipt of capital funds as well. (A-106-119).

On August 11, 1975, the Authority, by its Executive Director, indicated to the United States Department of Labor its desire to become a party to the National 13(c) Agreement. The Authority, in its letter of endorsement,

specifically agrees to become a party for the purpose of grants of Federal assistance received under Sections 5 and 3(h) of the Urban Mass Transportation Administration Act, for the period November 26, 1974 through September 30, 1977 (A-120-121).

Plaintiff-Appellant, being the local certified representative of the labor force under the New York State Taylor Law, likewise requested to become a party to this agreement on August 15, 1975 (A-121-213).

C) PLAINTIFF-APPELLANT, WHEN IT REPRESENTED MEMBERS OF THE PRIVATE CORPORATIONS WHICH WERE PREDECESSORS TO DEFENDANT-AUTHORITY DID NOT HAVE THE RIGHT TO ARBITRATE AN IMPASSE IN CONTRACT NEGOTIATIONS.

It is clear that no predecessor in interest to the Authority or its subsidiary corporations had ever agreed to arbitrate impasses in contract negotiations.

The contract between the Authority and Syracuse Transit Corporation, the largest predecessor condemned by the Authority, provided only for grievance arbitration. It is virtually the same contract which recently expired. Other predecessors were small and non-union and their employee agreements, where there were any, likewise did not contain an interest arbitration provision.

Plaintiff-Appellant, in its Brief, seeks to imply to this Court that the predecessors in interest to the Authority's subsidiary corporations granted to their employees the right to arbitrate impasses in contract disputes. This is clearly not true.

It is likewise not true, nor can Plaintiff-Appellant contend that Section 13(c) of the Urban Mass Transportation Administration Act gives any additional rights in collective bargaining than those which previously existed. A careful reading of the Congressional Record on April 4, 1963, including quotations carefully omitted by Appellant in its Brief, clearly evidences the intent of Congress, and more specifically Senator Morse, the sponsor of the amendment which later became Section 13(c), merely to preserve the status quo.

In his explanatory statement for his amendment, Senator Morse clearly states at page 5670-5671:

> "The danger in the bill as reported is that it could seriously disrupt collective bargaining, which has had such a long and successful history in the mass transportation field. Accordingly, the amendment provides protections for the interests of employees who may be affected by the assistance of financing provided under this legislation. The amendment would protect existing employee rights including pension rights; would continue collective bargaining <u>where it now exists</u> ..."; (emphasis added)

At page 5672, Senator Morse states:

> "(a) It makes it clear that the rights of beneficiaries will be preserved along with the rights of employees under existing collective bargaining agreements in effect in any mass transportation which is involved in any project assisted under the bill; (b) it makes it clear that collective bargaining in any situation where it now exists will be continued; (c) it assures employees that in the event of any layoff or downgrading of their employee classification in consequence of the development of any project under the bill, they will receive basic job protection benefits at least equivalent to those which have prevailed in the transportation industries subject to Federal regulation; and (d) it provides for the continuation of employment of any employees of any mass transportation system which has been transferred in consequence of any project which has been assisted under the bill." (emphasis added)

Further, at page 5672, Senator Morse states:

> "Organized labor wanted more than the Morse amendment offers. They wanted a guarantee that if a new transit company were to be established with Federal funds contributed to it, there would have to be collective bargaining. I said, 'In my judgment, you are not entitled to that'. Organized labor wanted a guarantee, in case after case, they they would be strengthened. I said, 'In my judgment, the only sound policy to which you are entitled is the maintenance of the status quo. If you have collective bargaining now, I think the bill ought to be so drawn that you will be assured of a continuance of collective bargaining, so far as the Federal Government is concerned'." (emphasis added)

Senator Goldwater, on debate, was concerned with regard to the overriding nature of 13(c), vis-a-vis State law -- whether a State statute preventing municipal em-

ployees from striking would be over-riden by Section 13(c).

Senator Goldwater stated at page 5672:

> "My feeling is that if there was a State law which prohibited a strike against any segment of Government, this language might preempt the State Law."

In response, Senator Morse stated at page 5672:

> "For the purpose of establishing the legislative history, let me assure the Senator from Arizona that such is not the intention of this language. Here we are talking, too, about the status quo; and whatever the status quo was in regard to that situation, it would continue to prevail." (emphasis added);

and at page 5673:

> "But continuance of the collective bargaining would not mean that the right to strike a private employer would also continue for the reason that the private employer has been replaced by a municipal employer. The public agency would still have the obligation to carry out all the collective bargaining obligations of the contract; but if State law forbade a strike against a municipality of course the union would be bound by the State law. ...
>
> The rights we are talking about are those spelled out in the collective bargaining agreement -- wages, hours, conditions of employment, pensions, welfare funds. This has nothing to do with the right to strike. In this sense, the right to strike is not part of the collective bargaining agreement. The State law would be controlling, because a strike would be contrary to the public policy as established by the paramount State law since the National Labor Relations Act, by your hypothesis, does not apply. 'My amendment does not affect any application made by a public agency operating under such a State policy'". (emphasis added)

Senator Morse summarizes his position when he states at page 5673:

> "The point I wish to stress in the legislative history is that the successor company stands in exactly the same shoes as the predecessor company, and whatever was binding upon the predecessor company in regard to the matter of conditions of employment is binding upon the successor company. The collective bargaining agreement continues until the parties by collective bargaining change the agreement". (emphasis added)

At Congressional Record 5676, Senator Morse states in response to a question by Senator Tower regarding the language of 13(c):

> "It means that the status quo must be preserved with respect to the employer-employee relationship. The relationships of the successor employer under a Federally assisted Project under the bill would be the same as its predecessor. (emphasis added)
>
> All I am saying is the public operation should extend to employees the same protection they have under private operation. . . .
>
> It means that the employees must be taken over with the plant; the position of the successor is no more or no less than his predecessor under this provision of the amendment.";

and again at 5677:

> "...I wish to point out that preserving the status quo of a contractual arrangement means continuing the present collective bargaining relationship under the arrangement between the parties and the administrator.
>
> ...To continue my argument would be only a matter of constant repitition. What the amendment would do, in spite of all the attacks on it, would be to assure existing collective bargaining rights

would not be taken away from the workers ...

> In my judgment, the Senator should, as a matter of public policy, adopt the Morse amendment, underriding the basic principal that the Senate does not propose to take away from labor in the mass transit bill hard-earned collective bargaining rights achieved over the years."

Senator Goldwater, on continued questioning of Senator Morse, states at page 5674:

> "If there is a local law, the language of the Senator from Oregon would not prevail."
>
> SENATOR MORSE: "The Senator is correct."

It is the contention of Defendants-Appellees that the Taylor Law procedures which have governed the relationships of the parties to this litigation in all prior contract negotiations, and even by agreement in this contract negotiation were never intended by the sponsor of the amendment which created Section 13(c) to be superseded thereby.

Even the National 13(c) Agreement in paragraph "4" thereof (A-107), states:

> "(4) The collective bargaining right of employees covered by this Agreement, including the right to arbitrate labor disputes and to maintain Union security and check-off arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued ...".

The language clearly does not provide for expanded collective bargaining rights.

This maintenance of the status quo is specifically detailed in Barnum, National Public Relations Legislation; The Case of Urban Mass Transit, 27 Lab. Law J. 168 (1976),

cited by Appellant at page 12 of its Brief.

Mr. Barnum specifically referred to the quotation by Senator Morse at Congressional Record page 5672, when Senator Morse states:

> "Organized labor wanted more than the Morse amendment offers. They wanted a guarantee that if a new transit company were to be established with Federal funds contributed to it, there would have to be collective bargaining. I said, 'In my judgment, you are not entitled to that.'.
>
> Organized labor wanted a guarantee in case after case that they would be strengthened. I said, 'In my judgment, the only sound policy to which you are entitled is the maintenance of the status quo. If you have collective bargaining now, I think the bill ought to be so drawn that you will be assured of a continuance of collective bargaining, so far as the Federal Government is concerned.'".

In support of its position, Appellant, in its Brief, states at AB-42 that:

> "A most important footnote is cited at the end of the last quoted sentence. That footnote provides that:
>
> > As an addendum to this agreement there shall be attached, where applicable, the arbitration or other dispute settlement procedures or arrangements provided for in the existing collective bargaining agreement or in any other existing agreement between the Recipient and the Union, subject to any changes in such agreements as may be agreed upon or determined by interest arbitration proceedings."

It is respectfully submitted that Plaintiff-Appellant fails to add emphasis to the most important words in that footnote, "where applicable". No such addendum was ever

annexed to the National 13(c) Agreement before this Court by either party, not even the 13(c) Agreement advanced by the Union in support of its position, which Appellees as one of their contentions submit that as of the date of the National 13(c) Agreement and its acceptance by the parties hereto, had been superseded.

It is obvious that neither party intended to expand the collective bargaining rights of Plaintiff-Appellant's members beyond those negotiated in the labor agreement. There is no contention that the most recent labor agreement which expired on October 30, 1976, when negotiated two years previously, diminished the collective bargaining rights which had previously existed between Plaintiff-Appellant and the Defendant-Authority or its predecessors.

Throughout its Brief, Appellant cites cases in the private sector which are absolutely inapplicable to the issue at bar. In its Brief, Appellant stresses the national policy in support of arbitration. What Appellant fails to mention is that this is a national policy proposed in the private sector where litigation is the alternative. In the public sector, the alternative to arbitration, as in the case of municipalities within the State of New York, are with Taylor Law procedures which are swift, equitable and constitutional and which have been a part of the law of New York State since 1967. The Taylor Law has always

provided the procedures in contract negotiations between the parties to this litigation, even though 13(c) Agreements were signed between the parties hereto. The constitutionality of the Taylor Law has been upheld in the highest Court of New York State. See McCoy v. Helsby, 34 A.D. 2d 352, 311 N.Y.S. 2d 60 (3d Dep't. 1970), aff'd 28 N.Y. 2d 790 (1970).

The express purpose of the Taylor Law as contained in Section 200 of the Civil Service Law of the State of New York, was the desire of the legislature to:

> "Promote harmonious and cooperative relationships between Government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations of Government ..."

Appellants contend that the Taylor Law prevents collective bargaining between municipal employers and their employees. Again, nothing could be further from the truth. Section 200 states:

> "These policies are best effectuated by ... (b) requiring the State, local Governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized ...".

The entire thrust of the Taylor Law is to place within that Governmental unit which is mandated to assure and protect the public within its realm of operations, the control of the procedure by which impasses are to be resolved.

As the PERB Board stated in Mount Vernon, supra,

> The core of the Taylor Law is the policy that governments should negotiate and enter into written agreements with employee organizations representing public employees which have been certified and recognized. Coercive action by an employee organization to impose its will is inappropriate. So is coercive action by a public employer. Nevertheless, there are occasions when contesting parties cannot reach an agreement and yet the business of government must proceed. The exigencies of government are particularly related to its budget-making process, and if the parties fail to reach an agreement, the budget of an employer must be confronted without an agreement having been made. To cover this eventuality, the law provides that the legislative body of the government involved shall take such action as it deems to be of public interest, including the interest of the public employees involved.
>
> In some measure, the function of a local legislature is similar to that of an arbitrator. There being an unresolved dispute between an employee organization and the executive branch of the government, the legislative body is to resolve the dispute by taking action that considers the interests of both parties. This responsibility was given to the local legislature, both because (unlike an ad hoc arbitrator) it has a continuing public responsibility and because it is a representative agency responsible to all interest groups, including public employees."

Throughout the Taylor Law, the interest of the public employees must be considered by the public employer. See for example Section 209(3)(e)(iv):

> "Thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved."

In the event that the legislative body acts unfairly, there are several swift procedural means within the Taylor Law and the Civil Practice Law and Rules of the State of New York for review of the legislative body's determination.

Perhaps most importantly, to its contention that the cases in the private sector advanced by Appellant are not applicable, is the fact that Congress itself never intended the 13(c) Agreement to apply Taft-Hartley benefits to public employees working for exempt municipalities.

In his debate at Congressional Record page 5672, Senator Morse stated:

> "Furthermore, we are also talking about a municipally owned and operated transit company, not covered by the Taft-Hartley Act." ...

and again at page 5673:

> "Then the Taft-Hartley Act is not applicable."

This is consistant with the rationale of the United States Supreme Court in the National League of Cities v. Usery, 49 L.Ed. 2d 245, 96 S.Ct. 2465 U.S. (1976), where an interpretation of the Fair Labor Standards Act, was sought to apply to State and other municipalities under the Commerce Clause of Article I of the Constitution of the United States. In fact, bringing it within the very holding of Usery, Appellant cites cases decided specifically on the Interstate Commerce Act at pages 14 et seq. of its Brief.

The Supreme Court stated in Usery at 49 L.Ed. 2d 252:

> "This Court has never doubted that there are limits upon the power of Congress, to override State sovereignty, even when exercising its otherwise plenary powers to tax or to regulate Commerce, which are conferred by Article I of the Constitution.",

and at page 253;

> "It is one thing to recognize the authority of Congress to enact laws regulating individual business necessarily subject to the dual sovereignty of the Government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of the Congressional authority directed not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every State Government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reap the matter, but because the Constitution prohibits it from exercising the authority in that manner."

Most importantly, the Supreme Court states at 49 L. Ed. 2d 254:

> "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime."

In its striking down of those portions of the Fair Labor Standards Act which apply to municipal governments, the Supreme Court states:

> "The Act displaces State policies regarding the manner in which they will structure delivery of those governmental services which their citizens require.";

and at page 256:

> "For even if we accept Appellee's assessments concerning the impact of the amendments, their application will none the less significantly alter or displace the States' abilities to

> structure employer-employee relationship in such areas as fire prevention, police protection, sanitation, public health and parks and recreation. These activities are typical of those performed by State and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independant existance'.".

It is therefore evident that even if Congress had intended that the 13(c) Agreement to the UMTA Act and agreements executed thereunder expanded rights not previously held, such as the right to arbitrate -- which Senator Morse specifically states was not the intention of Congress -- that such a mandate on State government would be an unconstitutional interference with the right of State government to control the manner in which its services are provided.

A case similar to the one at bar is Staten Island Rapid Transit Operating Authority v. International Brotherhood of the Electrical Workers, Local 922, et al, which is an unreported case, decided on February 4, 1977 in the Eastern District of New York, which case was filed with this Court and forwarded to Appellant's counsel with its papers on argument as to whether the fact-finding procedure should be stayed pending appeal, which argument was orally made before this Court on March 15, 1977. The facts are

as follows.

The Staten Island Rapid Transit Operating Authority (SIRTOA) is a subsidiary of the Metropolitan Transportation Authority, similar to Appellees herein. The operations of SIRTOA, however, extend between the States of New York and New Jersey. The question before the Court was whether the Railway Labor Act, which would permit a strike, or the Taylor Law, which would not, controlled. The Court held:

> "In view of the fact that there is a complex of final arrangements and public employees statutes which require interpretation and which involve complex administrative operations of the City and State, the Federal Court should abstain from deciding these State and local issues if it is at all possible to do so.
>
> It may well be that the State Courts will interpret the State law as not applying to employees of the Staten Island Rapid Transit Operating Authority for the purposes of limiting and controlling strikes. Certainly, the State Courts are in a much better position to interpret their law than this Court is."

On February 28, 1977, in this same action, New York State Supreme Court Justice Thomas A. Jones, in an unreported opinion which was likewise submitted to this Court upon prior argument on March 15, 1977, as Exhibit "G" to the papers thereto, Justice Jones in interpreting the Usery case, supra, reflected that the SIRTOA is a public benefit corporation and that its employees are public employees, as defined in the Taylor Law. Even

though they had never before negotiated under the Taylor Law, they were bound thereby and SIRTOA's employees were prohibited from striking against the Authority. Justice Jones held that the Railway Labor Act does not pre-empt the State of New York from legislating against strikes, even in interstate commerce.

In citing the Usery case, Justice Jones held:

> "Congress may not wield the Commerce Clause in a manner to impair a states' ability to function effectively within the Federal system (National League of Cities v. Usery, 49 L.Ed. 2d 245, 257 (1976)) ...
>
> The Supreme Court has thus reaffirmed the untrammelled right of States to protect their sovereignty and economic integrity, to make fundamental employment decisions in regard to the performance of vital public services. (257)".

Justice Jones, in citing City of New York v. DeLury, 23 N.Y. 2d 175 (1958), underlined the New York State Court of Appeals emphasis that a State must safeguard its economic solvency by quoting therefrom at page 186,

> "Again, the orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to have budgetary allocations -- free from the compulsions of crippling strikes -- require the regulation of strike by public employees where there are no similar countervaling reasons for prohibition of strikes in the private sector."

The legislature of the State of New York, when it created the Authority, stated its consideration that the:

> "(The purposes of the Authority) are in all respects for the benefit of the people of the State of New York and the Authority shall be regarded as performing an essential govern-

> mental function in carrying out its purposes and in exercising powers granted by this title". (A-74-75)

A similar concept referred to as "federalism" by the United States Supreme Court has given similar emphasis to the desire of the United States Supreme Court that Federal Courts not involve themselves in areas of State governmental concerns, unless specifically mandated to do so under a Constitutional Congressional enactment. See, for example, Rizzo v. Good, 4 23 U.S. 362, 46 L.Ed. 2d 561, 96 S.Ct. 598 (1976), where the Court states at 46 L.Ed. 2d 574, 575:

> "Thus, the principals of federalism which place such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principals likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments ...".

See likewise Hoffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed. 2d 482, 95 S.Ct. 1200 (1975).

D) THE TAYLOR LAW OF THE STATE OF NEW YORK CLEARLY EVIDENCES THE POLICY THAT NEW YORK STATE AGENCIES DETERMINE THE RESOLUTION OF IMPASSES IN COLLECTIVE BARGAINING IN ACCORDANCE WITH THE PROCEDURE SET FORTH THEREIN,

UNLESS SUCH STATE AGENCIES KNOWINGLY AND INTENTIONALLY CONTRACT AWAY SUCH PROCEDURES.

It is clear that the Taylor Law places within the sole determination of the governmental agency involved in accordance with the procedures guaranteeing fairness as set forth therein, the right to make determinations regarding the resolution of disputes. . .

The Taylor Law does not mandate arbitration for public employees of transportation authorities. It specifically mandates arbitration for other classes of employees such as policemen. In Section 209(2) it permits public employees to enter into written agreements with certified employee organizations. It provides:

> "Such agreements may include the undertaking by each party to submit unresolved issues to impartial arbitration. In the absence or upon the failure of such procedures, public employers and employee organizations may request the Board to render assistance as provided in this Section, or the Board may render such assistance on its own motion, as provided in subdivision "3" of this Section".

It is obvious from the past conduct of the parties to this litigation that neither considered any 13(c) Agreement between them as an agreement under Section 209(2) mandating the parties to submit unresolved issues to impartial arbitration. In all previous negotiations and in this negotiation specifically before the Court, both parties under the balance of the provisions of Section 209(2) requested PERB to render aid by the appointment of PERB mediators.

In its Brief at pages 46 through 50, the Appellant emphasizes the case of Susquehanna Valley School District v. Susquehanna Valley Teachers Association, 46 A.D. 2d 104 (3d Dep't. 1974), aff'd., 37 N.Y. 2d 614 (1975), for the position that the Taylor Law permits arbitration if a valid agreement exists providing therefor.

The Susquehanna case is probably the most important case that Appellees can assert in their behalf. At the Appellate Division, Third Department, it was made clear that the agreement between the Union and the public employer in that case specifically and by its terms provided:

> "That the parties would submit to binding arbitration as the fourth and final stage of the grievance procedure set forth in the contract with respect to matters contained in the contract. Matters with respect to salary and compensation of members of the association are among the items subject to the grievance policy of the contract ...".

In other words, the agreement in the Susquehanna case, under which the New York State Court felt arbitration proper, specifically incorporated the Taylor Law by reference and agreed that at a specified stage in the Taylor Law procedures, grievances would be submitted to a third party arbitrator.

No such agreement evidencing a specific intent to abandon the procedures of the Taylor Law which had so effectively governed the relationships of the parties is evident in the subject litigation before this Court.

Furthermore, in the New York State Court of Appeals decision of Susquehanna, 37 N.Y. 2d 614 (1975), at page 616, the New York State Court of Appeals specifically recognized:

> "Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or neither, may also restrict the freedom to arbitrate."

As previously stated, the contract between the predecessor employers to the Authority and the employees thereof, together with the present contract between the subsidiary corporations of the Authority and their employees, specifically permits arbitration of grievances. Those grievances which may be arbitrated are specifically set forth in the contract. Nowhere in the contracts as previously existed or as continuing today between such successor employers and their employees, both private and public, were there the slightest suggestions that contract negotiations be arbitrated.

E) JUDGE MAC MAHON DID NOT ABUSE HIS DISCRETION IN FINDING THAT THE APPELLANT, BY ITS INTENTIONAL AND VOLUNTARY CONDUCT WAIVED ANY RIGHT IT MIGHT HAVE HAD TO PROCEED OUTSIDE OF THE TAYLOR LAW.

In order to determine the position taken by Judge MacMahon preliminarily that there may have been a waiver of 13(c) rights, if any, by virtue of the agreement of both parties to proceed within the Taylor Law, Appellant reflects on the gener-

al tone of mediation as being so insignificant a step in the resolution of contract disputes that the parties are free to take whatever future course they may jointly desire.

To buttress its opinion, Appellant once again cites inapplicable cases in the private sector.

In support of Judge MacMahon's decision of waiver, is the Taylor Law itself. The Taylor Law must be read as a whole. It places within the purview of governmental corporations the ability to agree with their employees regarding impasse procedures and if no agreement exists, the Taylor Law governs. Section 209(3) specifically details those impasse procedures. Such procedures are not to be read separately, but as a whole so that the resolution of disputes will be orderly and known to all parties. Section 3 in pertinent part, states as follows:

> "On request of either party, or upon its own motion, as provided in subdivision 2 of this Section, and in the event the Board determines that an impasse exists in collective bargaining negotiations between such employee organization and the public employer as to the conditions of employment of public employees, the Board shall render assistance as follows:
>
> (a) To assist the parties to effect a voluntary resolution of the dispute, the Board shall appoint a mediator or mediators representative of the public from a list of qualified persons maintained by the Board;
> (b) If the impasse continues, <u>the Board shall appoint a fact-finding board</u> of

> not more than three members, each representative of the public, from a list of qualified persons maintained by the Board, which fact-finding board shall have in addition to the powers delegated to it by the Board, the power to make public recommendations for the resolution of the dispute ...". (emphasis added)

It is clear from the wording of the Taylor Law itself that the appointment of a fact-finder is a mandated next step on the PERB Board and the public employer in their efforts to resolve the impasse.

Appellant asserts Judge MacMahon's unqualified statement that the 13(c) Agreement advanced by the Union is a valid and enforceable agreement. This statement was later detailed by Judge MacMahon on two separate occasions, one of which was affirmed by this Court. The Union contends that the issue of waiver must be submitted to an arbitrator as a procedural step, and that the issue of waiver is not to be decided by the Court.

To this, Judge MacMahon stated his firm disagreement, at A-230, where Mr. King, attorney for the Union, states:

> "On the question, your Honor, of the waiver point, and the necessity of a trial, the cases do seem to indicate that that question had best be left to the arbitrator.
>
> THE COURT: Of course that depends initially on whether you have got a valid agreement to arbitrate, which in turn depends on resolution of all these various issues of fact. On whether there is such an agreement, I suppose is a question of fact turning essentially on what the parties intended

here, beyond all of this paper work that we have here. I don't think this case is anywhere near right for an ultimate determination at all. I think there are just too many uncertain questions of law, too many issues of fact which are all up in the air.

MR. KING: I don't interpret Plaintiff's position as that we deny the existance of the agreement, your Honor, and the amended agreement does contain the language --

THE COURT: There is more to it than language, more to it than language.

MR. KING: It is a question of whether or not this dispute, of course, in a broadly stated arbitration clause comes within the confines and as a violation, it would go, in the first instance, to the arbitrator, I would think.

THE COURT: Again, it depends on whether you have got an agreement and that is the key issue here, one of the key issues, whether you waive it if you do have it, whether you have an agreement.

MR. KING: I don't understand, your Honor, Defendant, Centro communicating that we do not have an agreement.

THE COURT: That was certainly their position on a preliminary injunction.

MR. KING: They never denied we have an agreement and we have offered copies.
THE COURT: Well, on the contrary, he has an Affidavit which says your agreement is expired. Isn't that so?

MR. SHULMAN: Yes, your Honor, we have in our moving papers put forth a National 13(c) Agreement which is newer and different agreement with different language.

THE COURT: Your whole position was that was not a collective bargaining agreement.

MR. SHULMAN: Yes, your Honor.

MR. KING: Well, as I understand, they are contending, apparently it superseded. They are not contending that was not an agreement.

MR. SHULMAN: In addition to our contention that is was superseded, we also contend that it was drawn for a limited purpose of obtaining Federal funding and not for collective bargaining issues at the expiration of the contract.

THE COURT: These were all issues for purposes of a preliminary injunction and the urgent situation, which now doesn't seem so urgent. Since everything can be put off until March, I don't see a great urgency. What was represented to the Court to be an urgent situation, that this thing go forward tomorrow and on the basis of that, I ran over here from Utica and held a hearing to determine whether this temporary restraining order should remain in full force and effect or whether it shouldn't. And that involves substantially the same issue as the motion for preliminary injunction, I treated it as the argument on a motion for a preliminary injunction and denied it and vacated the T.R.O."

Judge MacMahon's position that the validity of the Agreement is for the Court and not for an arbitrator, is supported by the majority of Court decisions. The case of Wiley & Sons v. Livingston, 376 U.S. 543 11 L.Ed. 2d 898, 84 S.Ct. 909 (1964), determined that procedural questions are to be submitted to an arbitrator, but only after it has been determined that the parties to a labor dispute are obligated to admit the subject matter to arbitration.

At 11 L.Ed. 2d 902, the Supreme Court in Wiley states:

> "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate is a matter to be determined by the Court on the basis of the contract entered into by the parties. ...
>
> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration can not precede Judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

2. TAYLOR LAW PROCEDURES WILL NOT IRREPERABLY HARM PLAINTIFF-APPELLANT.

Appellant has contended throughout that to pursue Taylor Law impasse procedures will be irreparably harmful to it. Appellees contend that this is absolutely not so. All transportation authorities in the State of New York, including the parties before this Court, have submitted all contract negotiations since their inception to the Taylor Law procedures as administered by PERB.

The Taylor Law has been in existence since 1967, pre-dating most transportation authorities, and has been the successful avenue for the resolution of contract disputes throughout New York State for the past ten years. Up to the point of a legislative mandate, all Taylor Law procedures for the resolution of impasses are advisory. They become binding on both sides only when agreed to. This is true of the fact-finding procedures under which both parties are presently effectively participating. Fact-finding

sessions have now been held, since the initial order of Judge MacMahon, on March 9th, 16th and 25, 1977. Fact-finding dates have been adjourned for the convenience of the Union on March 30, 1977, April 12th and 13, 1977. Substantial progress has been made at fact-finding sessions in the reduction of issues which confronted the parties. As has been stated before this Court on Affidavit and through exhibits, the ordering by Judge MacMahon of the parties to fact-finding has had a beneficial effect on labor relationships, permitting the re-commencement of negotiations and the resolution of contract disputes which have been stalled for approximately four months.

Fact-finding is advisory. Still, Appellant claims that it is irreparably harmed because of the expense and cost to which it has been put in preparing for hearings before the fact-finder. (See footnote AB-30)

Appellees have successfully contended at every prior stage in the motion before this Court, that the preparation to which Appellants are put by appearing before a fact-finder is minimal and is identically the same preparation that it would be required to prepare for a presentation to a mediator. Secondly, the United States Supreme Court and more recently the Seventh Circuit have held that mere litigation expense, even sub-

stantial and unrecoupable cost does not constitute irreparable injury. See Renegotiation Board v. Bancroft Clothing Co., 415 U.S. 1 (1974); Frey v. Commodity Exchange Authority, 547 F. 2d 46 (7th Cir. 1976).

Appellant next contends that the next step under the Tyalor Law, a legislative mandate, will cause it to suffer irreparable harm. In the first place, this Court in its order of March 15, 1977, has permitted Appellant to reapply for a stay if fact-finding fails. Secondly, this is an appeal only from the denial of a preliminary injunction relating only to fact-finding, not to every impasse procedure under the Taylor Law.

Thirdly, the imposition by a legislature of a mandated contract is only for a limited period and to the end of a fiscal year. Thereafter, contract negotiations re-commence. As PERB stated in the Mount Vernon Case, supra:

> "The core of the Taylor Law is the policy that governments should negotiate and enter into written agreements with employee organizations representing public employees which have been certified and recognized. Coercive action by an employee orgnization to impose its will is inappropriate. So is coercive action by a public employer. Nevertheless, there are occasions when contesting parties cannot reach an agreement and yet the business of government must proceed. The exigencies of government are particularly related to its budget-making process, and if the parties fail to reach an

> agreement, the budget of an employer must be confronted without an agreement having been made. To cover this eventuality, the law provides that the legislative body of the government involved shall take such action as it deems to be of public interest, including the interest of the public employees involved.
>
> In some measure, the function of a local legislature is similar to that of an arbitrator. There being an unresolved dispute between an employee organization and the executive branch of the government, the legislative body is to resolve the dispute by taking action that considers the interests of both parties. This responsibility was given to the local legislature, both because (unlike an ad hoc arbitrator), it has a continuing public responsibility and because it is a representative agency responsible to all interest groups, including public employees".

There is no reason to assume that a legislative mandate will be improperly imposed. Nothing would disserve the public purposes of the Authority more than to have a labor force which considers itself mistreated and irreparably harmed. In the unlikely event that the members of Plaintiff should consider the legislative mandate improper, there are several courses of relief under New York State law. Again, providing that harm, if it exists, is not irreparable. Two such avenues would be an Article 78 proceeding under the New York State Civil Practice Law and Rules, or in the alternative, an administrative application to the PERB Board under the provisions of Section 209-a(1) (improper employer practices). There is precedent for both such avenues.

3. DEFENDANTS-APPELLEES WILL BE IRREPARABLY HARMED IF THIS COURT STRETCHES THE INTERPRETATION OF THE MEANING OF A 13(c) AGREEMENT TO SUCH AN EXTENT THAT DEFENDANTS-APPELLEES AND EVERY OTHER TRANSPORTATION AUTHORITY AND PRIVATE BUS COMPANY IN THE UNITED STATES WHICH RECEIVES FUNDS FROM UMTA ARE FOREVER STRIPPED OF THEIR POWER TO NEGOTIATE AND CONTROL IMPASSES IN NEGOTIATIONS, PURSUANT TO APPLICABLE STATE LAW, AND MUST PERPETUALLY REFER CONTRACT NEGOTIATIONS TO A THIRD PARTY ARBITRATOR WHO IS NOT RESPONSIBLE UNDER STATE STATUTE FOR THE MAINTENANCE OF THE AGENCY'S OPERATIONS ON A SELF-SUSTAINING BASIS.

On the other hand, if the Authority cannot proceed under the Tyalor Law, it will be irreparably harmed. The Members of the transportation authority are mandated under their enabling legislation to carry out to the best of their ability the essential governmental functions mandated to them, which the State Legislature considers critical to the welfare of the residents of the central part of the State of New York. To delegate this legislative mandate to an arbitrator would be an unlawful delegation of authority and in addition, will clearly cause irreparable harm. Judge MacMahon was aware of this potential irreparable harm when in his Memorandum Decision (A-302) he stated:

> "Moreover, we can see no irreparable injury in Plaintiff's proceeding to fact-finding since all that the fact-finding board can do is render an advisory opinion. Against this, there was a decided public interest in the expeditious settlement through the Taylor Law of this labor dispute in the bus transportation industry of Central New York, to the end that the riding public will not be confronted with inconvenience. In our view, that tipped the balance of hardship in favor of the Defendant-Authority". (emphasis added)

The position in which the Authority finds itself in this regard is identical with the position of thousands of authorities and private bus companies, large and small throughout the United States, which several times each year sign 13(c) agreements for the receipt of federal funds for the implementation of capital and operating Projects.

4. THIS APPEAL IS MOOT.

Defendants-Appellees respectfully contend that this Appeal is moot by reason of the fact as aforesaid that the fact-finding sought to be enjoined by Appellant has been under way with the cooperation of both parties and has been and is successful in bringing the parties together on several negotiating differences. The parties have scheduled over six (6) sessions and have attended three (3). It is the hope of the Authority that these sessions will result in the execution of a new contract.

CONCLUSION

For all of the foregoing reasons and authorities, it is respectfully submitted that the Order of the District Court denying the Union's motion for preliminary injunction be affirmed and that:

1) This Appeal herein be dismissed, and further;

2) That the entire action herein be dismissed or remanded to the Courts of New York State.

Respectfully submitted,

AXENFELD, WEBB, MARSHALL,
BERSANI & SCOLARO

Attorneys for Appellees
500 Building
500 South Salina Street
Syracuse, New York 13202
Telephone: (315) 422-9201

Of Counsel:

BARRY M. SHULMAN, ESQ.

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